IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3020 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRIYESHKUMAR ASHWINKUMAR PATEL

Versus

STATE OF GUJARAT

Appearance:

MR HR PRAJAPATI for Petitioner No. 1

Ms Mita Panchal, AGP for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 27/04/2004

ORAL JUDGEMENT

The petitioner above named has preferred this petition under Article 227 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside the order of detention dated 27.2.2004 at Annexure 'A' to the petition passed by the second

respondent in exercise of powers vested in him by section 3(2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (for short, 'PBM').

2. It was alleged against the petitioner that the petitioner was not holding any licence for selling blue kerosene which is a controlled and essential commodity and a commodity with respect to which no commercial activity can be undertaken for sale or purchase or store thereof without getting a licence from the concerned authority. Therefore, when the petitioner was found dealing with blue kerosene without any licence, the kerosene in question was seized. Statement of the petitioner was recorded, sample was collected from the said kerosene which was referred to the chemical analyst. On receiving the report, it was learnt that it was blue kerosene. FIR was filed against the petitioner.In exercise of the powers conferred under section 3(2) of the PBM Act, by order dated 27.2.2004, the petitioner was ordered to be detained. The petitioner has challenged the said order on several grounds. However, it has been contended that there was a delay on the part of the detaining authority in passing the order of detention and, therefore, it can be said that there was no immediate need to detain the petitioner and, therefore, when the inordinate delay has not been explained, the resultant effect would be that the order of detention cannot be sustained in the eye of law. That the order of detention is illegal and deserves to be set aside.

3. On receiving the petition, rule was issued and in response to the notice of rule, Ms. Mita Panchal, learned AGP appears on behalf of the respondents. So far as respondent No.4 Union of India is concerned, Ms. P J Davawala, learned Addl.Central Govt.Standing Counsel appears. I have heard the learned Advocates for the parties and have perused the papers.

4. During the course of hearing, Mrs. Davawala, learned Standing Counsel has submitted affidavit of Shri A K Ganguly, Under Secretary in the Department of Consumer Affairs, Food and Public Distribution, New Delhi. It has been taken on record. Ms. Mita Panchal, learned AGP has also submitted affidavit of the detaining authority. It is also taken on record.

5. At the hearing, learned Advocate for the petitioner has contended that as per the case of the detaining authority, the petitioner was found in possession of blue kerosene on 28.11.2003. That

panchnama was drawn, sample was collected, statement of the petitioner and other persons were recorded. The petitioner's admission was also taken into consideration showing that he was dealing in blue kerosene without any licence for the said purpose. Though the process was over very soon, the detention order was passed as late as on 27.2.2004 . It was argued by the learned Advocate for the petitioner that this inordinate delay has not been explained and therefore, it can be said that there was no immediate need to detain the petitioner.

6. In reply to the same, the Learned AGP has referred to the explanation in paras 14 and 15 of the affidavit. Para 14 of the affidavit at page no.35 is reproduced for ready reference:

"With reference to para 4 (m) of the petition is concerned, I say that the statement and averments made in this para are not true hence I deny the same, I say that on the basis of inquiry made on date 28.11.2003, a detailed report was submitted on 1.12.2003 and the sample of the kerosene was sent to F.S.L. at Science Laboratory, Gandhinagar and thereafter a report of the FSL was received on 3.1.2004 thereafter police complaint was filed on 9.1.2004 against the petitioner against the petitioner detenu and petitioner was arrested on 12.1.2004 for the said criminal offence and thereafter petitioner detenu was released on bail by the competent court on 19.1.2004 and the said order was received in the office of Mamlatdar on 12.2.2004 which they have forwarded to the officer of detaining authority, vide letter dated 17.2.2004 which is received at our office on 20.2.2004 and thereafter the order was passed on dated 27.2.2004. Hence it cannot be said that thee is a delay in passing the order as contended by the petitioner detenu in the present paragraph"

There it has been mentioned that after the enquiry detailed report was submitted on 1.12.2003, sample was sent to the FSL and thereafter FIR was filed, the petitioner was enlarged by the Court concerned. Therefore, according to the detaining authority, time was spent in the aforesaid process. In this connection, learned Advocate for the petitioner has relied upon a decision of this court in Special Civil Application No.9936/2003 rendered in the case of Parbhubhai v.State of Gujarat dated 25.9.2003 (Coram : Hon'ble Mr Justice J R Vora). Similar situation had arisen in the said case

also. There also sample was referred to the chemical analyst and after receiving report, detention order was passed. The pertinent observation from the said judgment may be reproduced for ready reference as follows:

> In detention matter, it is not necessary to wait till the report of chemical analyst for the reasons that a statement of the petitioner admitting incident recorded. A panchnama is also drawn to the effect that the kerosene which came to be seized from the petitioner was a blue colour kerosene, therefore, when the object of detention is always to see that the person may be immediately prevented from acting prejudicial to the maintenance of supply of essential commodity and from preventing him from indulging in the activity of black marketing, immediate action is imperative of law. The delay in passing the order in such circumstances would frustrate the entire object of legislation. Further the live-link between the incident complained of on which the assumption of repetitive tendency is based, and that the passing of the order itself is snapped by causing delay. Ld. advocate for the petitioner has relied upon a decision of this court unreported delivered on 16.1.2003 in the matter of Nandlal Nanalal Tailee v State of Gujarat. In this view of the matter, the order of detention is required to be quashed and set aside on this ground alone."

It can be gathered from the said judgment that as per the pronouncement of this court, the detaining authority was not required to wait till the result of the report of the chemical analyst. The reason would be that on a bare look at the liquid seized, it showed that it was blue kerosene. Statement of the petitioner was also recorded soon after the seizure of the said kerosene. Here also the petitioner had admitted that he was dealing in blue kerosene. Therefore, according to the decision of this court in the above referred matter, there was no necessity for the detaining authority to wait for the report from the chemical analyst.

7. A similar view was taken by this court in judgment dated 23.1.2003 in Special Civil Application No.105890 of 2002 in the case of Manoharlal Khatik v. State of Gujarat (Coram: Hon'ble Mr Justice P B Majmudar). While dealing with the said issue, the learned Judge had made reference to the decision of this court dated 16.3.2002 in Special Civil Application

No.78/2000. On the strength of the above observation in the said matter, this court had found that there was a delay in dealing with the issue as they waited for the report from the chemical analyst and, therefore, when the delay is not an ordinary one and when it has not been explained then it cannot be said that the petitioner was required to be immediately detained and if the petitioner was not required to be detained immediately, order of detention could not be passed.

8. In the present case, we find that even as per the grounds of detention, the petitioner was found indulging in the illegal activities of the sale of blue kerosene on 28.11.2003. Sample was collected and kerosene was seized on the same day. Statements of the driver and owner of the vehicle were recorded on 28.11.2003. Even the petitioner's statement was also recorded therein. he has admitted that he was dealing in blue kerosene without pass or permit. This shows that in the present case the above materials were on hand with the detaining authority and, therefore, as stated in the aforesaid decision in Special C.A. No.9936/2003, the detaining authority was not required to wait till the result of the FSL report.

9. It can also be gathered that the FSL report was received on 1.1.2004 whereas the order of detention has been passed as late as on 27.2.2004. Therefore, again there was a delay in passing the order of detention and the said delay of nearly two months has not been explained. The learned AGP has also contended that FIR was filed against the petitioner for offence under section 3 read with section 7 of the Essential Commodities Act, 1955. However, filing of FIR was not sufficient for taking stringent action against the petitioner. Therefore, on the one hand, the detaining authority was not required to wait for the report of the FSL report, on the other hand, the detaining authority was not required to wait till the filing of FIR.

10. Therefore, the time taken for waiting for FSL report and for filing of FIR cannot be said to be reasonable explanation for passing the order of detention late.

11. In other words, the delay in passing the order of detention cannot be said to have been properly explained and looking to the inordinate delay in passing the order of detention, the said delay, since it is not explained, is fatal to the order of detention. In other words, the order of detention cannot be sustained in the eye of law on solitary ground of delay in passing the order of

detention. Therefore, the order of detention has to be treated to be illegal.

12. For the foregoing reasons, this petition is allowed. The impugned order dated 27.2.2004 passed by respondent No.2 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]
msp